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Proof of Negligence in a 905(b) Action After Scindia - for the Plaintiff

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PROOF OF NEGLIGENCE IN A 905(b) ACTION AFTER *SCINDIA*—FOR THE PLAINTIFF

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The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act[1] were intended to place some limitations on the liability of shipowners for injuries occurring during loading or unloading operations. To effect this goal, the amendments took from longshoremen and harbor workers the right to recover for unseaworthiness, but explicitly reserved their right to sue the vessel for negligence in 33 U.S.C. § 905(b). However, the amendments did not fully define the scope of the statutory negligence action; the courts were left to determine the precise limits of the action by establishing the range of shipowner duties upon which it could be based.

In applying the amendments, however, the circuit courts split between two different interpretations.[2] The Second, Fourth, and Fifth

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1. 33 U.S.C. §§ 901-952 (1976). Section 905(b) provides as follows:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

2. While most of the circuits lined up behind one of the two interpretations discussed in the text, the Third Circuit adopted yet another view of the shipowner's duties under the amendments. *See* Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), *vacated sub nom.* American Commercial Lines v. Griffith, 451 U.S. 965 (1981); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977). The Third Circuit was unwilling to impose upon shipowners an unqualified duty to exercise "reasonable care under the circumstances." At the same time, the court refused to accept the proposition that a shipowner's duties under section 905(b) should be defined in all cases by reference to sections 343 and 343A of the Restatement (Second) of Torts. The Third Circuit suggested that section 905(b) should be interpreted as imposing on the shipowner a standard of "reasonable care under the circumstances,"

Circuits defined the range of shipowner's duties—and therefore the reach of section 905(b)—in terms of a landowner's duty to invitees as stated in sections 343 and 343A of the Restatement (Second) of Torts.[3] The First, Seventh, and Ninth Circuits rejected the land-based definition and adopted a test of "reasonable care under the circumstances" as the measure of shipowner duties under section 905(b).[4]

With this backdrop, the United States Supreme Court finally addressed the question of what duties were owed by the shipowner under section 905 of the Act. In *Scindia Steam Navigation Co. v. De Los Santos*,[5] the Court refused to adopt either of the definitions of the shipowner's duties employed by the circuit courts. The Supreme Court instead established a middle ground, interpreting the duties imposed on shipowners by section 905(b) more expansively than the land-based definition adopted by the Fifth Circuit but less expansively than the "reasonable care under the circumstances" definition adopted by the Ninth Circuit.

THE *SCINDIA* DECISION

The *Scindia* decision should first be analyzed in light of the facts of that case. There was evidence in *Scindia* that the ship's winch had been malfunctioning during stevedoring operations for two days prior to the accident. Further evidence indicated that the malfunction may have at least contributed to the injury sustained by the plaintiff.[6] The Court stated that a question remained as to whether the shipowner had actual knowledge of the failure of the winch's braking mechanism,

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but not the same general standard of "reasonable care under the circumstances" adopted by the other circuits. The Third Circuit asserted that "reasonable care under the circumstances" should be defined in terms of land-based negligence principles such as those found in the Restatement (Second) of Torts, where those principles were not inconsistent with the purposes of section 905(b). The Third Circuit went on to suggest, however, that reference to sections 343 and 343A of the Restatement, which define the landowner's liability to persons on his land, was not always appropriate. The Third Circuit felt that the duties of a shipowner to longshoremen under section 905(b) could more properly be defined by reference to those sections of the Restatement addressing a landowner's liability to the employees of an independent contractor. *See Hurst*, 554 F.2d 1237 (3d Cir. 1977).

3. Gay v. Ocean Transp. & Trading, 546 F.2d 1233 (5th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., Panama, 540 F.2d 757 (4th Cir. 1976); Napoli v. Hellenic Lines, 536 F.2d 505 (2d Cir. 1976).

4. Santos v. Scindia Steam Nav. Co., 598 F.2d 480, 486 (9th Cir. 1979); *see also* Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 348 (1st Cir. 1980); *cf.* Matthews v. Ernst Russ S.S. Co., 603 F.2d 676 (7th Cir. 1979).

5. 451 U.S. 156 (1981).

6. *Id.* at 159-60.

although the plaintiff apparently conceded that no one from the ship's crew was ever informed of the condition of the winch. The Court also found that a question remained as to whether the winch was defective before the beginning of stevedoring operations, so as to charge the shipowner with knowledge of the condition.[7] There apparently was no evidence in the record indicating that Scindia retained any control over that part of the vessel during the loading operation.[8] Faced with this situation, the Court recognized that the shipowner's duties to longshoremen working on board the vessel fall into at least three distinguishable "categories."[9]

The first of these categories relates to conditions existing on the vessel at the beginning of stevedoring operations. Citing its decision in *Federal Marine Terminals v. Burnside Shipping Co.*[10] with approval, the Court again asserted that the shipowner has a duty to exercise reasonable care under the circumstances to have the ship and its equipment in such condition that a stevedoring company will be able, by the exercise of reasonable care, to carry on its operations with reasonable safety to persons and property. The shipowner also has a duty to warn the stevedore of hazards on the ship or with respect to the condition of its equipment that are known to him or should be known to him in the exercise of reasonable care and which would not be obvious to or anticipated by the stevedore.[11]

The second category of shipowner duties relates to the situation in which the shipowner remains actively involved in or retains control of the cargo operations. In this context, the shipowner has the duty to avoid negligently injuring longshoremen and he has a further duty to exercise reasonable care to avoid exposing longshoremen to harm from hazards encountered in areas or from equipment under the active control of the vessel.[12]

The final "category" of shipowner duties attempts to define the owner's responsibility with respect to conditions which develop dur-

7. *Id.* at 178.

8. *Id.* at 161-62.

9. In Duplantis v. Zigler Shipyards, 692 F.2d 372 (5th Cir. 1982), the Fifth Circuit interpreted *Scindia* in a similar manner. The Fifth Circuit indicated that *Scindia* had recognized the existence of separate, distinct duties owed by shipowners to the employees of stevedores, and went on to discuss the "three principles" enunciated in *Scindia* that govern these duties. *Id.* at 374. The Fifth Circuit also held that the same duties owed by shipowners to stevedores and their employees under *Scindia* were also owed by shipowners to independent contractors and their employees.

10. 394 U.S. 404 (1969).

11. 451 U.S. at 167.

12. *Id.*

ing stevedoring operations over which the shipowner has retained no control. Under these circumstances, the shipowner has no general duty to supervise the work of the stevedoring employees or to prevent development of dangerous conditions within the area of the cargo operation under the exclusive control of the stevedore, "absent contract provision, positive law or custom to the contrary."[13] However, if the shipowner has knowledge of a dangerous condition *and* of an obviously improvident failure of the stevedore to take corrective action, the shipowner has a duty to intervene and either stop the operation or repair the defect.

From the plaintiff's viewpoint, it is felt that the concurring opinion of Justice Brennan accurately summarizes the duties which should be imposed on the shipowner:

> My views are that under the 1972 Amendments: (1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.
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> Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.[14]

While admittedly there could be considerable discussion as to whether this concurring opinion says exactly what the opinion of Justice White says,[15] it is felt that the duties covered by the post-*Scindia* 905(b)

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13. *Id.* at 172.

14. *Id.* at 179-80.

15. For example, the first duty listed by Justice Brennan, the "general duty to exercise reasonable care under the circumstances," is not necessarily in agreement with Justice White's opinion. If Justice Brennan is referring to a general duty on the part of the shipowner to exercise reasonable care, *before* the stevedore is given exclusive control of the equipment and operations, to place the ship and its equipment in such condition that an experienced stevedore could carry on his cargo operations with reasonable safety, then this statement is consistent with Justice White's opinion.

negligence action will most likely assume the form described by Justice Brennan.

POST-*SCINDIA* DECISIONS

A number of decisions have interpreted *Scindia* and applied the duties discussed by the Supreme Court to various fact situations. These cases will be considered as they relate to the three categories of duties discussed by the court in *Scindia.*[16]

Duties with Respect to Conditions Present at the Beginning of Stevedoring Operations

The shipowner's duties with respect to the condition of the vessel and its equipment prior to the beginning of stevedoring operations are clear; he has the duty to use reasonable care to see that the ship, its equipment, and work spaces are in such condition as will permit the stevedoring company to carry out cargo operations with reasonable safety, and he also has the duty to warn the stevedore of any hazards known to him or which should have been known to him and which would not ordinarily be anticipated by the stevedore.

The Third Circuit, in *Griffith v. Wheeling-Pittsburgh Steel Corp.*,[17] addressed a case in which a longshoreman was injured due to a defective hatch cover on a barge. The hatch cover in question was stuck because of damage or improper maintenance and was in that condition when the barge was delivered. In the process of closing the cover, the plaintiff fell into the hold through an adjacent hatch cover. After reviewing duties articulated by the Supreme Court in *Scindia*, the Third Circuit found that the vessel owner knew or should have known of the defect prior to turning the barge over to the stevedore. The vessel owner also had reason to believe that the stevedore might use a method of moving the stuck hatch covers which would expose a

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Id. at 166-67. However, if Justice Brennan is referring to a *continuing* duty on the part of the shipowner to exercise "reasonable care under the circumstances" *after* the stevedore has been given exclusive control of equipment and cargo operations, then his statement of this first duty could be considered contrary to the views expressed by Justice White, under some factual circumstances. *Id.* at 163 n.10, 168-69.

However, the stevedore is rarely given actual "exclusive" control of equipment and cargo operations on most cargo vessels.

16. For another discussion of these duties, see Edelman, *Standard of Care in Longshoremen's Negligence Cases*, N.Y.L.J., Oct. 1. 1982, at 1, col. 1.

17. 657 F.2d 25 (3d Cir. 1981). This case was on remand from the Supreme Court to be considered further in light of the decision in *Scindia.* American Commercial Lines v. Griffith, 451 U.S. 965 (1981).

longshoreman to an unreasonable risk of injury. The vessel owner took no steps to prevent harm to the longshoreman and the court concluded that, under such circumstances, imposition of liability was consistent with *Scindia.*

The Fifth Circuit was presented with a similar case in *Stass v. American Commercial Lines,*[18] in which the plaintiff longshoreman had been assigned with a few other longshoremen to open grain doors and inspect the rain seals for damage. Stass and his co-worker, unaware that the doors were inoperable, encountered trouble when they attempted to open the third set of doors and, try as they might, were unable to open them. While trying to lift the doors, Stass slipped and fell backwards into an open hatch behind him. The district court granted judgment in favor of the barge owner based upon the land-based standard applied in the Fifth Circuit before *Scindia.* The Fifth Circuit reversed and remanded, stating that it was clear from *Scindia* that a vessel owner is under an obligation to turn his vessel over to the stevedore in a reasonably safe condition, and he is required to warn the stevedore of any malfunction in the ship's gear or equipment that is either known or which should be known to the owner. Failure to take any action with respect to the defective grain door here was clearly a violation of these duties.[19]

In *Lemon v. Banks Lines,*[20] the Fifth Circuit extended the vessel owner's duty in this regard to potentially dangerous conditions existing in previously stowed cargo. In *Lemon,* rolls of burlap had been loaded into the hold of the ship in a manner which created gaps between the rolls and the skin of the ship. Bales of jute had been dumped in as "filler cargo" in the overhead spaces as well as in the spaces that had developed along the sides of the hold. A longshoreman was in the hold unloading when he noticed that one of the stacks of jute seemed unstable. In an attempt to rectify the situation, the longshoreman was seriously injured.

At the district court level, a jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo and that this negligence proximately contributed to the plaintiff's injury. The district court granted judgment notwithstanding the verdict in favor of the shipowner. The testimony showed that the chief mate had actual knowledge of the improper loading technique and

18. 683 F.2d 120 (5th Cir. 1981).

19. *Accord* Wild v. Lykes Bros. S.S. Corp., 665 F.2d 519 (5th Cir. 1981) (defective condition of a ladder existed before the commencement of work by the repair crew).

20. 656 F.2d 110, 116-17 (5th Cir. 1981).

failed to take action to either correct the stowage or to warn the plaintiff of the dangerous conditions. The Fifth Circuit held that, in light of the *Scindia* decision, the district court erred in granting judgment notwithstanding the verdict.

In a similar case, *Clay v. Lykes Brothers Steamship Co.*,[21] the United States District Court for the Eastern District of Louisiana held the shipowner responsible for injury to a longshoreman attributable to the improper stowage of cargo. In this case, a lash barge had been improperly loaded in London. Two cargo containers had been loaded onto the barge and lashed along their bottoms by cable. Bundles of steel tubing were then loaded upon the deck of the barge and on top of the cable in such a manner as to completely hide the cable. When the off-loading stevedores began to raise the containers from the barge, the cable was placed under tension and broke, causing injury to the longshoreman. The district court held that the vessel owner had no duty to supervise the on-loading stevedores, but that the owner did have a duty to examine the completed assignment and to warn the unloading stevedore of any dangerous conditions created by the loading stevedore. The court therefore found that Lykes should have been aware of the dangerous cable and that it breached its duty by failing to warn the plaintiff of the dangerous condition existing from the beginning of the operation.

The Ninth Circuit has also imposed liability on shipowners in connection with injuries caused by improper stowage of cargo. In *Turner v. Japan Lines*,[22] a longshoreman was injured while unloading a cargo of plywood when a stack of the plywood collapsed beneath him. There was evidence that the plywood had been stowed improperly by a Japanese stevedore and that the improper stowage was due to a lack of proper shoring of the stacked plywood. The evidence further showed that the stowage of the cargo was unreasonably dangerous to the off-loading longshoremen, and that the defect could not have been discovered by them.

Expert testimony in the *Turner* case established that the master or one of his mates is responsible for overseeing the loading operations and particularly for insuring that the cargo is properly shored. The Ninth Circuit therefore found that the shipowner should have known of the condition of the stow and should have warned the stevedore of the dangerous condition. The court also found that the shipowner's failure to warn of this condition negligently caused the

21. 525 F. Supp. 306 (E.D. La. 1981).
22. 651 F.2d 1300 (9th Cir. 1981).

plaintiff's injuries. It is interesting to note, as did the Ninth Circuit, that section 905(b) did not prevent the shipowner from bringing an indemnity action against the foreign stevedore, since it was not the plaintiff's employer.[23]

One of the more recent cases addressing the shipowner's duty with respect to pre-existing conditions is *Subingsubing v. Reardon Smith Line, Ltd.*[24] The accident in the *Subingsubing* case occurred when the longshoreman slipped on a "dead-eye" that had been left on the deck. This dead-eye came from a ladder used by the vessel's crew before the longshoremen came on board. The Ninth Circuit, citing *Scindia*, observed that a shipowner's duties extend at least to exercising ordinary care to have the ship and its equipment in such a condition that expert and experienced stevedores could carry on a cargo operation with reasonable safety. The court also noted that the Senate Committee Report on the 1972 amendments had referred to the example of a slip and fall caused by an oil spill in illustrating the standard of care imposed on vessels.[25] Emphasizing the similarity between the facts of the instant case and those in the example given by the Senate Committee—the only difference being the cause of the hazard—the court held that the shipowner's duty "should at least include reasonable care to keep the deck clear of dangerous and non-obvious tripping hazards at the time that the longshoreworker comes on board."[26]

Landsem v. Isuzu Motors[27] is a good example of how such a case is lost by the plaintiff. The plaintiff in *Landsem* had slipped in oil on the vessel's deck; he contended that the oil was present before cargo operations began and that the situation should have been discovered and corrected by the vessel. However, the plaintiff failed to present any evidence that the oil was present when cargo operations began, that the shipowner had notice or knowledge of the oil,

23. *Id.* at 1304.

24. 682 F.2d 779 (9th Cir. 1982).

25. So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully of [sic] negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

S. REP. NO. 1125, 92d Cong., 2d Sess. 10-11 (1972).

26. 682 F.2d at 782.

27. 534 F. Supp. 448 (W.D. Or. 1982).

or that the oil could have been discovered in the exercise of reasonable care. The district court granted summary judgment for the shipowner on the ground that the plaintiff's evidence was insufficient to support a finding that the shipowner breached any duty imposed on him by law. The lesson for plaintiff's counsel should be obvious.

Duties Imposed when the Shipowner Retains Control over or Actively Participates in Cargo Operations

In *Scindia*, the Supreme Court stated that, absent contractual provisions, positive law, or custom to the contrary, the shipowner has no general duty to supervise or inspect for dangerous conditions that develop during the cargo operations. However, the Court also stated:

> [T]he vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation.[28]

It is submitted that, because of the practicalities of ship-board activities during cargo operations, the majority of the post-*Scindia* decisions ought to fall into this category.[29] There are numerous situations

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28. 451 U.S. at 167.

29. In fact, a number of post-*Scindia* cases decided by the courts on the basis of a shipowner's continuing duty with respect to areas committed to the stevedore's exclusive control have actually involved negligence on the part of the vessel owner while he was participating in or sharing control of the cargo operations. One such case is Rother v. Interstate Ocean Transp. Co., 540 F. Supp. 477 (E.D. Pa. 1982). In *Rother*, a tug had maneuvered an oil barge to an unloading dock for discharge of its cargo; the injury occurred as the plaintiff was attempting to move a discharge line across the top of a railing. The court held the vessel negligent because of the failure of the captain to intervene and correct what the court found to be an obviously improvident method of discharge that created an unreasonable risk of harm to the dock worker. *Id.* at 483. However, the unsafe condition itself had been created by the negligence of the captain in failing to correctly position the barge for unloading. Similarly, in Bush v. Sumitomo Bank & Trust Co., 513 F. Supp. 1051 (E.D. Tex. 1981), the court held the vessel liable for its failure to stop the improvident conduct of the stevedore in continuing to use a malfunctioning winch which created an unreasonable risk of harm to the longshoremen. Again, however, liability could more properly have been based upon the negligence of the ship's crew in an incomplete attempt to repair the winch before the accident. Melanson v. Caribou Reefers, Ltd., 667 F.2d 213 (1st Cir. 1981), provides a final example of this. In *Melanson*, a longshoreman suffered a heart attack while attempting to lift two fifty pound cartons which had frozen together. The stevedore had allowed the longshoremen to continue unloading the cartons after it had been discovered that some of them were frozen together. The shipowner was chargeable with the knowledge of the condition; the longshoremen had requested the

in which the shipowner will have a duty to use reasonable care to prevent or eliminate dangerous conditions which develop during cargo operations, either because of the involvement of the vessel crew or because of the presence of contractual provisions, positive law, or custom.

Fortunately for longshoremen, there are now available to plaintiffs' counsel a number of decisions that illustrate the situations in which this more comprehensive duty to discover and eliminate dangerous conditions attaches. For example, in *Lieggi v. Maritime Co. of the Philippines*,[30] as part of the unloading operation, longshoremen were required to use a winch located on a platform above the deck. A greased cable and several grease spots were on top of this platform . The cable was part of the ship's gear and had been used earlier in the day by a different longshore gang who failed to put it away. After first encountering these obstacles, the longshoreman hatch boss located the ship's mate and they inspected the platform together. The ship's mate agreed to have the area cleaned up, and the longshoremen were directed to continue working. The cable and the grease spots were never removed from the platform, however, and one of the longshoremen later slipped on them. Because the mate had affirmatively undertaken to correct the unsafe conditions, the Second Circuit affirmed the jury's finding of negligence on the part of the shipowner.[31]

The shipowner may also incur liability when a member of the ship's crew creates the danger to the longshoremen. In *Fanetti v. Hellenic Lines*,[32] the Second Circuit affirmed a jury's finding of liability on the part of the shipowner for a dangerous condition on the

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ship's assistance and a crew member with a pry bar obliged. *Id.* at 214. The First Circuit affirmed summary judgment in favor of the shipowner, holding that the plaintiff longshoreman had not adduced sufficient evidence to create a jury issue as to whether the shipowner had violated the continuing duty imposed by the "obviously improvident" language of *Scindia*. The court asserted that even if the shipowner were charged with knowledge of the condition, the danger was not so obvious, nor the conduct of the stevedore so improvident, as to impose a duty to intervene on the shipowner. In point of fact, however, it seems that this case actually involved a situation in which the ship's crew participated in the cargo discharge operation—not a situation in which a dangerous condition developed in an area under the exclusive control of the stevedore, or which should have been dealt with in terms of the shipowner's continuing duty under the "obviously improvident" standard.

30. 667 F.2d 324 (2d Cir. 1981).

31. *Id.* at 329. *But see* Melanson v. Caribou Reefers, Ltd., 667 F.2d 213 (1st Cir. 1981), discussed *supra* note 29, where the vessel crew acted to assist with a problem in cargo handling, but no negligence was found because the harm was not forseeable.

32. 678 F.2d 424 (2d Cir. 1982).

decks created by the ship's crew. When the cargo operation began, the main deck area was relatively clear. Throughout the day, however, the ship's crew left turnbuckles and other lashing equipment on the deck, cluttering the area through which the longshoremen had to walk in order to get to the winch controls. While returning to the winch stand, the plaintiff fell on the gear left by the ship's crew. The Second Circuit, affirming the district court's rejection of the jury instruction requested by the shipowner as to its liability, held that a shipowner choosing to act as its own stevedore (as Hellenic Lines did in this case) is not entitled to the insulation from liability which the hiring of an independent contractor might afford.[33] As a result, the ship and shipowner were held primarily liable for the hazard created by the ship's crew. The Second Circuit also indicated, however, that even where an independent stevedoring contractor has been hired, the ship would be primarily responsible for hazards created by the ship's crew.[34]

In addition, the shipowner can be held to a standard of reasonable care under the circumstances where he exercises or retains control over any portion of the cargo operations concurrently with the stevedore, as illustrated by *Davis v. Partenreederei M.S. Normannia.*[35] In *Davis*, the plaintiff's injury was caused by improper positioning of the gangway. Even though the stevedore superintendent had the authority to move the gangway during unloading, expert testimony established that the ship's officers had a continuing responsiblility, even during the discharge of cargo, to correct the positioning of the gangway. In effect, the plaintiff had proven the existence of a custom which imposed on the vessel owner a duty to exercise reasonable care to avoid harm to the longshoremen.[36] The jury verdict in favor of the plaintiff was affirmed.

Of course, additional duties to longshoremen may also be placed on the shipowner by positive law, custom, or contract provisions. For example, in *Duty v. East Coast Tender Service*,[37] a longshoreman was injured when a vessel struck the platform on which he was working. The Fourth Circuit held that the violation of a Coast Guard regulation applicable to the vessel requiring the motor vessel to have a licensed operator was negligence *per se*. And, in *Irizarry v. Compania*

33. *Id.* at 428.
34. *Id.* at 427.
35. 657 F.2d 1048 (9th Cir. 1981).
36. *See id.* at 1052.
37. 660 F.2d 933 (4th Cir. 1981). *But cf. Scindia*, 451 U.S. at 177 n.25 (Coast Guard regulations not applicable to a foreign vessel).

Maritime Navegacion Netumar, S.A.,[38] the Second Circuit relied on the specific duties imposed on a vessel by the Joint Maritime Safety Code of the Port of New York—prepared pursuant to the *labor agreement* between the International Longshoremen's Association and the New York Shipping Association—in affirming without published opinion a jury verdict against the vessel.

Finally, in *Duplantis v. Zigler Shipyards*,[39] a claim was made that industry custom placed a duty on the shipowner to obtain a certificate that the ship was free of explosive gases before workmen could be permitted to weld. The Fifth Circuit held that a regulation requiring the inspection of a vessel and the issuance of a certificate that the vessel was gas-free before any welding could be performed did not impose upon the vessel owner a non-delegable duty to secure the certificate when the shipowner had engaged a competent independent contractor to do the work. The court then affirmed a summary judgment in favor of the shipowner, stating that the evidence did not establish that industry custom placed this duty on the shipowner.[40] The thrust of this decision in regard to duties imposed by custom should not be lost on plaintiffs' attorneys; the plaintiff must prove the existence of customs and practices that give rise to additional responsibilities on the part of the shipowner. The court will not assume the existence of such practices nor lightly impose upon shipowners the responsibilities associated with them.[41]

Where the ship's crew retains control over or participates in the cargo operation, the vessel may be liable for both its actions and its failure to act. Furthermore, the range and scope of the shipowner's duties are broadened and the burden of proof on the plaintiff longshoreman reduced where the shipowner remains actively involved in the cargo operations.[42] This was illustrated in *Pluyer v. Mitsui*

38. 628 F.2d 1345 (2d Cir. 1980) (jury verdict affirmed without opinion), *cert. denied*, 451 U.S. 969 (1981). This case was noted with interest by the Supreme Court in *Scindia*. 451 U.S. at 177 n.25.

39. 692 F.2d 372 (5th Cir. 1982).

40. *Id.* at 375.

41. *See id.; cf.* Keller v. United States, 557 F. Supp. 1218, 1224-25 (D.C. N.H. 1983).

42. The burden of proof on the plaintiff longshoreman is reduced because, in the situation in which the shipowner is actively involved in cargo operations, the longshoreman need prove only that the shipowner was negligent in his own operations, i.e., that his failure to exercise reasonable care created a dangerous condition that caused injury. In the situation in which the shipowner has given exclusive control of cargo operations to a stevedore and in which the shipowner is sought to be held liable for negligence in failing to intervene in the stevedore's operations, the plaintiff longshoreman must go a step further to prove negligence. In this situation, the longshoreman must prove not only that the shipowner knew of the dangerous condition and that he failed to take steps to rectify it, but also that the stevedore's

O.S.K. Lines.[43] In *Pluyer*, the Fifth Circuit affirmed a finding by the district court that the shipowner was liable for injuries to a longshoreman resulting from use of an unsafe ladder furnished by the vessel to the longshoremen. The ladder lacked nonskid pads on the bottom, and, while plaintiff was climbing down the ladder, the ladder slipped out from under him. The court distinguished *Scindia* on two grounds: (1) in *Scindia* the negligence was passive, the result of a failure of the vessel to act, while in this case the negligence was active, the vessel involving itself by furnishing an unsafe ladder; and (2) *Scindia* was concerned only with the shipowner's liability for dangerous conditions developing during the cargo operations, while this case involved a hazard that antedated or coincided with the beginning of operations.[44] The court concluded that it was faced with a situation different from that presented in *Scindia* and that "[t]he policy considerations which militate against imposing a duty on a shipowner to constantly monitor the stevedore's work are therefore not applicable."[45]

One of the more recent decisions involving active negligence on the part of the vessel owner is *Chiasson v. Rogers Terminal & Shipping Corp.*[46] In *Chiasson*, a longshoreman was injured when a grain loading vessel drifted away from the ship it was loading and dumped grain on the plaintiff rather than into the hatch of the ship. Liability was predicated upon the failure of the owner of the grain loading vessel, who was also the plaintiff's employer, to equip the vessel with the winches necessary to hold it in place. This case is highly significant in one respect—it permitted imposition of third-party liability on the stevedoring employer for its negligence as a vessel owner under section 905(b).[47]

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continuation of operations in spite of the dangerous condition was "obviously improvident." In other words, the shipowner can not be held liable in these circumstances unless the longshoreman establishes that the shipowner was not entitled to rely upon the judgment of the stevedore. This is simply a function of the much narrower duty the shipowner has under section 905(b) after turning over the exclusive control of cargo operations to the stevedore. The purpose of this narrower duty is simply to effect an allocation of responsibility between the stevedore and the shipowner that is fair and that places liability on the party in the best position to prevent the injuries to longshoremen. *See Scindia*, 451 U.S. at 180-81 (Powell, J., concurring).

43. 664 F.2d 1243 (5th Cir. 1982).

44. *Id.* at 1246.

45. *Id.*

46. 679 F.2d 410 (5th Cir. 1982).

47. In a very recent case, Jones & Laughlin Steel Corp. v. Pfeifer, 103 S.Ct. 2541 (1983), the Supreme Court endorsed the position of the Fifth Circuit on this, permitting the imposition of third-party liability on a stevedoring company employer (who was also the vessel owner) for its negligence as a vessel owner under section 905(b).

Duties Imposed in Areas "Outside the Control" of the Shipowner

The record in *Scindia* was apparently devoid of evidence indicating that the shipowner had retained any control over the cargo loading operation. In the absence of any shipowner control over cargo operations—a situation that is probably rare in the real world of cargo vessels—the Court refused to recognize a general, continuing duty on the part of the shipowner to inspect or supervise the work of the longshoremen or to prevent the development of dangerous conditions within the stevedoring operation.[48] The Court did indicate, however, that even where the shipowner has relinquished all control over the loading operations, he might still have a duty to intervene to eliminate unreasonable risks of harm to the longshoremen in certain limited circumstances.[49] As an example of a situation in which such a duty might exist, the Court posited a hypothetical in which the stevedore's decision to continue operations in the face of a dangerous condition was "so obviously improvident" that the shipowner, if he knew of the dangerous condition and of the stevedore's continued operations in spite of it, should have realized that there was an unreasonable risk of harm to the longshoremen.[50] Thus, it appears that two circumstances must concur before the shipowner has a continuing duty to longshoremen, with respect to areas in the exclusive control of the stevedore: (1) the shipowner must have knowledge of or be aware of the dangerous condition, and (2) the stevedore's failure to remedy the condition must be "obviously improvident."

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48. *See* 451 U.S. at 163 n.10, 168, 172, 180 (Powell, J., concurring).

49. *See id.* at 174-76, 180 (Powell, J., concurring). *But cf. id.* at 179 (Brennan, J., concurring) (the fourth duty listed by Brennan).

50. *See id.* at 175, 180 (Powell, J., concurring). It is important to note that Justice White's plurality opinion *did not decide* that the shipowner *did* have a duty to intervene and eliminate the dangerous condition under the circumstances presented in *Scindia* (though Justice Powell's concurrence assumes that it did). Justice White only raises the question of whether such a duty on the part of the shipowner exists in the described circumstances:

> If Scindia was aware that the winch was malfunctioning to some degree, and if there was a jury issue as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?
>
> *We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order . . . .*

Id. at 178 (emphasis added).

Moser v. Texas Trailer Corp.[51] is instructive in regard to the first of these requirements. In *Moser*, the Fifth Circuit affirmed a judgment of no liability on the part of the vessel owner for a dangerous condition occurring in an area outside its control. The court agreed with the trial court that the shipowner had breached no duty owed to the plaintiff "since [the plaintiff's] injury was caused by a transitory condition of which [the shipowner] had no knowledge."[52] Actual knowledge of the dangerous condition was held necessary to the existence of a continuing duty on the part of the shipowner, under the facts presented in this particular case.[53]

Knowledge of the dangerous condition alone, however, will not give rise to a continuing duty on the part of the shipowner. The stevedore's failure to remedy the condition must also be "obviously improvident." In *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*,[54] the Seventh Circuit discussed this second prerequisite to the existence of a continuing duty on the part of the shipowner; the opinion is very helpful in explaining what is involved in the "obviously improvident" requirement and in determining what must be shown in order to establish that the requirement has been met and that a continuing duty has arisen. Referring to the Supreme Court's characterization of the shipowner's duties in *Scindia*, the court stated:

> In the Court's view, the fact that the shipowner knew of the malfunction would not in itself make him negligent; it might be reasonable for him to rely on the stevedore's judgment that

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51. 694 F.2d 96 (5th Cir. 1982).

52. *Id.* at 98.

53. The Supreme Court consistently asserted throughout the *Scindia* opinion that a shipowner could have a continuing duty with respect to areas under the stevedore's control if the shipowner actually knew of the dangerous condition. *See* 451 U.S. at 172. Subsequent decisions have expanded on this, however, and have suggested that proof of *actual* knowledge might not always be required to give rise to a continuing duty on the part of the shipowner. *See* Bueno v. United States, 687 F.2d 318, 320 (9th Cir. 1982) ("The issue [is] . . . whether, in the course of its regular inspection activities, the shipowner should have noticed the serious danger and intervened to correct it. . . . [W]hen conditions are obviously dangerous, constructive knowledge on the part of the shipowner can be inferred, even where actual knowledge cannot be shown."); *cf.* Woodruff v. United States, 710 F.2d 128 (4th Cir. 1983).

54. 683 F.2d 1022 (7th Cir. 1982). This case contains a very good discussion of all of the duties imposed on shipowners under section 905(b). It should again be noted that, absent control over or participation in cargo operations, the shipowner does not have a general, continuing duty to supervise the activities of individual stevedoring employees. This principle could have produced the result in *United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, but the court based its decision on foreseeability.

> the winch, though defective, was safe enough. . . . But if the stevedore's judgment was "so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen," then the shipowner would have a duty to intervene and repair the winch. . . . This is analogous to the common law duty of a principal to the employees or other potential accident victims of an independent contractor.[55]

The court recommended but did not require that the district courts "balanc[e] the usefulness to the ship of the dangerous condition and the burden involved in curing it against the probability and severity of the harm it poses,"[56] when determining "whether the shipowner should be required to backstop, as it were, the safety measures taken by the stevedore, or whether he can rely on the stevedore to keep the longshoremen out of harm's way"[57] with respect to areas outside the control of the shipowner. Thus, while it may not always be reasonable for the shipowner to rely on the stevedore's judgment, the shipowner does not necessarily have a duty to "shepherd" the activities of individual longshoremen with respect to areas over which the stevedore has been given exclusive control.

A very interesting construction was placed on this "obviously improvident" requirement by the Fourth Circuit in *Gill v. Hango Ship-Owners/AB*,[58] in which the court reversed a summary judgment in favor of the shipowner. The record in *Gill* disclosed that the longshoremen had been using breakout clamps owned by the stevedoring company to unload rolls of paper from the hatch. The accident occurred when a clamp which had been placed on a roll of paper by the plaintiff slipped off as the roll was being lifted and struck the plaintiff. Expert testimony established that the rolls of paper could not have been unloaded without the use of the breakout clamps. It was also the expert's opinion that the clamps were inherently dangerous.

The Fourth Circuit disagreed with the district court's conclusion that the plaintiff's injury was not reasonably foreseeable as a matter of law.[59] The court also noted that there was evidence that "the manner in which the cargo was stored precluded the stevedore from

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55. *Id.* at 1025 (quoting *Scindia*, 451 U.S. at 175-76).

56. 683 F.2d at 1025-26 (quoting Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 348 (1st Cir. 1980)).

57. 683 F.2d at 1025.

58. 682 F.2d 1070 (4th Cir. 1982).

59. *Id.* at 1074.

unloading by any other means except one which was inherently dangerous,"[60] and observed that, if this were so, "this [was] not a case in which the stevedore failed to use reasonable care but, in effect, one in which the shipowner was the only party at fault."[61] Finally, the court stated that even if the stevedore had also been negligent in using the breakout clamps, liability on the part of the shipowner was not foreclosed. Echoing the "obviously improvident" language of *Scindia*, the court declared:

> [I]t seems to us that the evidence is sufficient to establish a jury issue as to whether the breakout clamp was so unsafe that the stevedore should have ceased using it, if no alternative device was available, and, therefore, a jury issue as to whether [the shipowner] should have intervened to stop the loading operation until it could be done with reasonable safety.[62]

CONCLUSION

In summary, negligence actions may be brought by longshoremen against shipowners under section 905(b) for the violation of any one of three distinct duties. The first of these is the duty of the shipowner to exercise reasonable care to see that the ship, its equipment, and its cargo are in a condition that will allow the stevedoring company to perform its work safely; this duty also entails warning the stevedore of any dangerous conditions that were either known or which should have been known to the shipowner. A shipowner will incur liability for violation of this duty only if the defects or dangerous conditions causing injury existed *prior* to the beginning of cargo operations. The second shipowner duty recognized under section 905(b) is the duty to exercise reasonable care to avoid injury to longshoremen when the vessel retains control over or participates in cargo operations. Finally, the shipowner has a continuing duty to intervene in stevedoring operations when the shipowner has knowledge of a dangerous condition that presents an unreasonable risk of harm to longshoremen and is aware of an obviously improvident failure of the stevedore to rectify it. This duty may render the shipowner liable for harm caused by defects or dangerous conditions that develop *after* the beginning of stevedoring operations, even though the defect or condition develops in an area over which the stevedore has been given exclusive control.

60. *Id.*
61. *Id.* at 1074-75.
62. *Id.* at 1075.

It should be noted that all three of the *Scindia* duties can come into play in one case. *Ryder v. United States*,[63] a pre-*Scindia* case, provides a good example of such a situation. In *Ryder*, the vessel was put into the shipyard for repairs, including repair to the steampipes, with the ship's crew remaining aboard. Repair workers were warned that steam would remain in some of the pipes and that they should be cautious as to which pipes were worked on. The injury occurred when the repair crew worked on a valve without clearance from the ship's officers. The district court imposed liability on the shipowner in spite of the warning that had been given. The court found from the evidence that a duty had been imposed by custom and practice on shipowners to provide for the safety of repair workers by the isolation, locking, and/or tagging of valves that might pose a danger. The evidence also showed that any member of the ship's crew had authority to stop at once any work which appeared to pose a danger to the repair workers and that members of the ship's crew were in the area and had seen the work in progress.

It is apparent that the result in *Ryder* would have been obtained by application of the duties framed by the Supreme Court in *Scindia*. The vessel in *Ryder* discharged its initial duty to warn of the hazardous condition, but that was not its only duty. There was evidence that custom imposed a duty on the shipowner to take further precautions and that the crew was in concurrent control of the work and could have prevented the harm. There was also evidence of an "obviously improvident" action: namely, the removal of a valve on a live steam line—a dangerous maneuver known to the ship's crew. The vessel did not intervene to stop the work and remedy the dangerous condition.

Finally, in applying the standards of *Scindia* to a given fact situation, plaintiff's counsel should also be mindful of the Supreme Court's decision in *Edmonds v. Compagnie Generale Transatlantique*.[64] The negligent shipowner remains liable for all of the losses sustained by the injured longshoreman, even though the stevedoring company is concurrently negligent in causing the injury. Such concurrent negligence between shipowner and stevedore is, as a practical matter, the rule rather than the exception.

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63. 513 F. Supp. 551 (D. Mass. 1981).

64. 443 U.S. 256 (1979); *see also* Bueno v. United States, 687 F.2d 318 (9th Cir. 1982).